85-1638

Supreme Court, U.S.
FILED
APR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LAW MATHEMATICS AND TECHNOLOGY, INC., PETITIONER

v.

UNITED STATES OF AMERIC

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

GEORGE CURTIS SPONSLER III
7804 Old Chester Road
Bethesda, MD 20817
(301) 986-1120

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Whether it is a misuse of the Limitation of Funds clause and a breach of contract for Navy to employ that clause to correct unilaterally its own unilateral mistake in authority made in issuing a research and development contract to a private contractor.

2. Whether the doctrine of finality also bars Navy from correcting unilaterally its own unilateral mistake in authority made prior to and contemporaneously with contract execution.

TABLE OF CONTENTS

Opinions below 1

Jurisdiction 2

Constitutional and statutory provisions 2

Statement 8

Reasons for granting the petition 17

Conclusion 36

Appendix A 1a

Appendix B 16a

Appendix C 22a

Appendix D 23a

Appendix E 24a

Appendix F 28a

Appendix G 31a

Appendix H 33a

Appendix I 34a

TABLE OF AUTHORITIES

Cases:

Acme Precision Products, Inc., ASBCA No. 6824, 61-1 BCA ¶3051 (1961) 18
American Electronics Laboratories, Inc. v. United States, 774 F.2d 1110 (Fed. Cir. 1985) 20
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 25
Cooke v. United States, 91 U.S. (1 Otto) 389 (1875) 31
Electrospace Corp., ASBCA 14520, 72-1, BCA ¶9455 (1972) 30
Garcia Concrete, Inc., AGBCA 78-105-4, 82-2 BCA ¶16,046 (1982) 24,30
Garsick v. Dehner, 15 N.W.2d 235 (Neb. 1973) 21
Juda v. United States, 6 Cl. Ct. 441 (1984) 23,24
Liberty Coat Co., ASBCA 4119, 4138 & 4139, 57-2 BCA ¶1576 (1957) 32,34,35
McQuagge v. United States, 197 F. Supp. 460 (1961) 23
National Factors Inc. v. United States, 204 Ct. Cl. 98 (1974) 26
Ottinger v. United States, 116 Ct. Cl. 282 (1950) 24
Schlesinger v. United States, 182 Ct. Cl. 571 (1968) 27
Taylor v. Burr Printing Co., 26 F.2d 331, cert. den. 49 S.Ct. 641 (1928) 22
Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982) 26
United States v. A. Bently & Sons Co., 293 F. 229 (S.D. Ohio 1923) 22
United States v. Purcell Envelope Co., 249 U.S. 313 (1919) 31,33
United States v. Utah, N.&C. Stage Co., 199 U.S. 414 (1905) 24
Vargas v. Esquire, Inc., 166 F.2d 651, cert. den. 69 S.Ct. 29 (1948) 21

Constitution, statutes and regulations:
United States Constitution, Art. I, §9, cl. 7 2,17
Adequacy of Appropriations Act, 41 U.S.C. §11 (1952) 3,17
Anti-Deficiency Act, 31 U.S.C. §665 (1958) 2,17
Contract Disputes Act, 41 U.S.C. §§601-613 (1978) 14,15
Armed Services Procurement Regulations:
Limitation of Cost or Funds under Cost Type Contracts (1 July 1976, 1:213) 6
Limitation of Funds (1966 Oct, 7:245) 3

Other authorities:
Corpus Juris Secundum, Art. 17
§135 22
§143 21
Federal Procurement Law, Nash & Cibinic, George Washington University (1977) 29
Navy Contract Law, 2nd ed. (1959) w. 1965 Supp. 17
Rules of the Supreme Court of the United States, No. 17.1(c), (1980) 21

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No.

LAW MATHEMATICS AND TECHNOLOGY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

George Curtis Sponsler III, attorney for and president of petitioner, Law Mathematics and Technology, Inc., petitions on behalf of petitioner for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-15a) is reported at 779 F.2d 675. The opinion of the Armed Services Board of Contract Appeals (App. B, infra, 16a-21a) is reported at 85-1 BCA (CCH) ¶17,765 (ASBCA 1984).

JURISDICTION

The judgement of the court of appeals (App. C, infra, 22a) was entered on December 12, 1985. A petition for rehearing was denied on February 18, 1986 (App. D, infra, 23a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, §9, cl. 7 of the Constitution states:

> No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

Pursuant to this constitutional provision, Congress passed the Anti-Deficiency Act, 31 U.S.C. §665 (1958), subsequently recodified as 31 U.S.C. §1341, which reads as follows:

> §1341. Limitations on expending and obligating amounts
> (a)(1) An officer or employee of the United States Government . . . may not-
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
> (B) involve (the) government in a contract

or obligation for the payment of money before an appropriation is made unless authorized by law.

Similarly, the Adequacy of Appropriations Act, 41 U.S.C. §11 (1952), provides:

> §11. No contracts or purchases unless authorized or under adequate appropriation
>
> (a) No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, . . .

In compliance with these Acts, to assure that no obligation or expenditure is made before the annual appropriations by Congress, and and to provide against over-expenditure (overrun) of funds allotted within a particular fiscal year, the Department of Defense has issued procurement regulations followed by Navy which, as incorporated in the contract at bar, dictate certain clauses which provide (ASPR, 7:245):

> LIMITATION OF FUNDS (1966 OCT)
>
> (a) It is estimated that the cost to the Government for the performance of this contract will not exceed the estimated cost set forth in the Schedule, and the Contractor agrees to use his best efforts to perform the work specified in the Schedule and all obligations under this contract

within such estimated cost.

(b) The amount presently available for payment and allotted to this contract, the items covered thereby, and the period of performance which it is estimated the allotted amount will cover, are specified in the Schedule. It is contemplated that from time to time additional funds will be allotted to this contract up to the full estimated cost set forth in the Schedule, exclusive of fee. The Contractor agrees to perform or have performed work on this contract up to the point at which the total amount paid and payable by the Government pursuant to the terms of this contract approximates but does not exceed the total amount actually allotted to the contract.

(c) If at any time the Contractor has reason to believe that the costs which he expects to incur in the performance of this contract in the succeeding sixty (60) days, when added to all costs previously incurred, will exceed seventy-five percent (75%) of the total amount then allotted to the contract, the Contractor shall notify the Contracting Officer in writing to that effect. The notice shall state the estimated amount of additional funds required to continue performance for the period set forth in the Schedule. Sixty (60) days prior to the end of the period specified in the Schedule the Contractor will advise the Contracting Officer in writing as to the estimated amount of additional funds, if any, that will be required for the timely performance of the work under the contract or for such further period as may be specified in the Schedule or otherwise agreed to by the parties. If, after such notification, additional funds are not allotted by the

end of the period set forth in the Schedule or an agreed date substituted therefor, the Contracting Officer will, upon written request by the Contractor, terminate this contract pursuant to the provisions of the Termination clause on such date. If the Contractor, in the exercise of his reasonable judgment, estimates that the funds available will allow him to continue to discharge his obligations hereunder for a period extending beyond such date, he shall specify the later date in his request and the Contracting Officer, in his discretion, may terminate this contract on that later date.

(d) Except as required by other provisions of this contract specifically citing and stated to be an exception from this clause, the Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the total amount from time to time allotted to the contract, and the Contractor shall not be obligated to continue performance under the contract (including actions under the Termination clause) or otherwise to incur costs in excess of the amount allotted to the contract unless and until the Contracting Officer has notified the Contractor in writing that such allotted amount has been increased and has specified in such notice an increased amount constituting the total amount then allotted to the contract. To the extent the amount allotted exceeds the estimated cost set forth in the Schedule, such estimate cost shall be correspondingly increased. No notice, communication or representation in any form or from any person other than the Contracting Officer shall affect the amount allotted to this contract. In the absence of the specified notice, the Government shall not be obligated to reimburse the Contractor for any costs in excess

of the total amount then allotted to the contract, whether those excess costs were incurred during the course of the contract or as a result of termination. When and to the extent that the amount allotted to the contract has been increased, any costs incurred by the Contractor in excess of the amount previously allotted shall be allowable to the same extent as if such costs had been incurred after such increase in the amount allotted; unless the Contracting Officer issues a termination or other notice and directs that the increase is solely for the purpose of covering termination or other specfied expenses.

(e) Change orders issued pursuant to the Changes clause of this contract shall not be considered an authorization to the Contractor to exceed the amount allotted in the Schedule in the absence of a statement in the change order, or other contract modification, increasing the amount allotted.

The Armed Services Procurement Regulations, as they were known at the time of the execution of the contract at bar, also provide for certain General Provisions which pertain to the Limitatio of Funds clause, as follows (1 July 1976, 1:213):

Part 20 - Limitation of Cost or Funds Under Cost Type Contracts

1-2000 Scope of Part. This Part sets forth information for, and the responsibilities of, the contracting officer with respect to the funding of cost-reimbursement type contracts. It includes material pertaining to
(i) availability of funds;
(ii) issuance of a change order, . . .

(iii) action to be taken when the limit of the funds allocated or the estimated cost is being approached.

1-2001 Limitation of Cost or Funds.

(a) When using a cost-reimbursement type contract, the contracting officer will assure that sufficient funds are available at all times . . .

(b) Under a cost-reimbursement type contract, the contracting officer may, without immediately increasing the funds available for the contract, issue a change order, ... , or a termination notice.

Note: The Contractor is obligated to comply with such an order, direction or notice as long as funds are available within the estimated cost or amount allotted to the contract. . . .

(c) The contracting officer shall take prompt and formal action as soon as he is notified or becomes aware that a contractor is approaching the limits of the funds allotted to a contract or is approaching the estimated cost of the contract . . . The contracting officer shall, in addition, promptly notify the contractor in writing that: (emphasis added)

(i) additional funds have been allocated . .

(ii) the contract is not to be further funded, and instruct the contractor to submit a proposal for an adjustment of fee, if any, based on percentage of completion of work performed in relation to the total work required under the contract (emphasis added)

(iii) the contract is to be terminated; or

. . .

Relevant excerpts from the contract at bar, which relate to the "Schedule" referred to in the clauses above, are presented in the Appendix hereto (App. I, infra, 34a).

STATEMENT

This entire case focuses on one major material Navy mistake in authority: the belief of the Office of Naval Research (ONR), which negotiated and executed the contract at bar, that the contract and three others similarly funded could and would be transferred to another Navy office, Navy Tactical Support Activity (NTSA), when the ONR TAC D&E Program Office, Code 230, which issued the contract, was disestab lished and its responsibilities transferred to NTSA on October 1, 1983. This central mistake and several other related ones have been consistently ignored amd disregarded during the course of this litigation by ONR itself, the Armed Services Board of Contract Appeals (board), and the United States Court of Appeals for the Federal Circuit (court), which also have all failed to address the key issue of this petition: the alleged misuse of the Limitation of Funds clause (LOF).

Contracting authority is vested in the head of each government activity with procurement

functions who in turn delegates that authority to appropriate contracting officers. In ONR, that person, in mid July 1983 when the contracting officer advised Law Mathematics and Technology, Inc. (LMT) that ONR had decided to award the contract and authorized LMT to begin work on 18 July 1983, was the Acting Chief of Naval Research, Captain Keith P. Garland, USN. On 29 July 1983 Capt. Garland wrote the Director Tactical Readiness Program (OP-953) that for the past few years ONR had been studying its involvement with the TAC D&E Program. Garland believed NTSA was "chartered to provide identical TAC D&E support" (App. F, infra, 29a). To avoid "unnecessary duplication" Garland proposed to transfer the ONR Code 230 function to NTSA on 1 October 1983 (id.).

The contract at bar was executed September 12, 1983. Prior to that time, in or about August 1983, the scientific officer assigned to the contract, Dr. Varley, prepared a procurement request from fiscal year (FY) 1984 funds in the amount of $49,608 to complete the final

portion of the estimated cost of Phase I of the contract, scheduled for February 18, 1984 (infra, 6a, 34a), the only phase contracted, the others being options which van Metre, the contracting officer, had advised LMT in July 1983 were not planned to be funded. At the time of execution, van Metre testified at the board hearing that he had no doubt as to the continued availability of funding for the contract, nor did he then anticipate terminating or letting it expire. (Hearing transcript, 107 11. 1-15).

At a meeting on September 7, 1983 Varley advised Sponsler, LMT president, that he, Varley, was to be replaced as scientific officer on the contract by Mr. Charles Francis who would continue to serve in that capacity through the completion of Phase I. He also advised Sponsler, for the first time, that the contract was to be transferred to NTSA, where Francis was to be assigned, and that ONR Code 230 was to be disestablished on September 30, 1983, and that this was the reason the origin-

ally proposed Phases II-IV had not been funded. Francis was introduced to Sponsler at this meeting in which both were in attendance through out. (Hearing transcript, 39, 40 & 157).

The second week of October 1983 LMT received a letter from the NTSA Director which ratified the advice of Varley and Francis that LMT's contract had been transferred to NTSA. (App. H, infra, 33a). However, that letter, dated 4 October 1983, unknown to LMT had been signed and mailed in error by Letow, the NTSA Director. (Hearing transcript, 151-154).

Previously, on September 15, 1983, unknown to LMT, a meeting had been chaired by Letow at which the ONR Code 230 contracts proposed for transfer to NTSA had been reviewed for the first time. Letow then discovered that the contract at bar and three others similarly funded could not be monitored under criteria set forth in the NTSA Charter to be followed by NTSA at the Direction on OP-953. No other criteria were considered in reaching the decision to withdraw the FY 84 funding from the four con-

tracts which resulted. Although Letow had "known for many years" that the NTSA Charter prohibited NTSA from monitoring contracts involving "research and technology implications", and although he himself had been informed of the possible transfer of ONR Code 230 to NTSA, there had been no previous discussion of contracts, per se. Furthermore, no one from NTSA prior to September 15, 1983 had advised ONR that the four contracts could not be monitored by NTSA because of the NTSA Charter prohibition. (Hearing transcript, 127-135).

Van Metre, and Varley by copy, was advised by memorandum on 16 September 1983 of the review of 15 September and directed that the $49,608 FY 84 procurement request previously prepared by Varley should "be cancelled and returned". (See App. G, infra, 31a & 32a).

Thereafter van Metre immediately attempted to telephone Sponsler to advise that the anticipated FY 84 funds had been withdrawn. But Sponsler was on vacation. Van Metre did not

advise any other LMT representative that the FY 84 funds had been withdrawn. Indeed van Metre forgot to phone LMT again. At the board hearing van Metre freely admitted his mistake, testifying that because of his other responsibilites, the matter simply "fell through the crack". (Hearing transcript, 48, 173 & 174). Van Metre finally advised Sponsler that there would be no FY 84 funds when Sponsler phoned him November 3, 1983 to advise, inter alia, that LMT was approaching the 75% expenditure point with the FY 83 funds. Van Metre never did comply with the Armed Services Procurement requirement that he promptly notify LMT in writing that the contract was not to be funded further, nor did he instruct LMT to submit a proposal for an adjustment of fee based on percentage of completion of work. (See ASPR 1-2000 (c), supra, 7).

Under terms of a Memorandum of Agreement between ONR and NTSA, van Metre continued to serve as contracting officer for the former Code 230 contracts after their transfer to

NTSA on October 1, 1983.

For several months following the November 3, 1983 telephone notification, Sponsler attempted in vain to persuade Navy to reinstate the anticipated FY 84 funds. Frustrated in that attempt, LMT submitted its initial claim to ONR, acting pursuant to the Contracts Disputes Act of 1978, 41 U.S.C. 601-613, essentially claiming: estoppel, abuse of discretion, breach of contract, and misuse of the LOF clause. On 21 May 1984 van Metre denied the claim, explaining that "NTSA'c Charter does not provide for them to pursue" the type of research represented by the contract at bar, and alluded to the use of the LOF clause to allow the contract to expire. (App. E, infra, 24a-27a).

Again acting pursuant to the Contracts Disputes Act, LMT appealed the final decision of the Contracting Officer to the board. The board found no estoppel and no abuse of discretion tantamount to breach of contract. However, the board misidentified the actual abuse of

discretion alleged by LMT which related to misuse of the LOF clause effectively or constructively to terminate the contract for the convenience of the government, not to the direction of the contracting officer that LMT should prepare a final report, as understood by the board. (App. B, infra, 16a-21a).

The Contracts Disputes Act of 1978 provides for judicial review of decisions of agency boards of contract appeals. See 41 U.S.C. 607(g) and 609. LMT, having been denied by the board, therefore elected to appeal to the court below. (App. A, infra, 1a-15a). The court found "The only legal issue for this court to decide is whether the Navy should be estopped from allowing the contract to expire and "die a natural death," according to its terms". (Id., 10a). It did not rule on the alleged misuse of the LOF clause, and affirmed the board, leading to the present petition to this honorable Court.

The key fact in this Statement is the delayed recognition and impact of the NTSA

Charter. Navy, meaning ONR, negotiated and executed the contract at bar in the mistaken belief that ONR Code 230 and NTSA were "identical", until advised to the contrary at the September 15, 1983 meeting which followed the execution of the contract on September 12, 1983. LMT never knew, nor had it any reason to know, of the Charter nor of its unexpected impact, until advised by van Metre in his Final Decision of 21 May 1984. To LMT's knowledge, that NTSA Charter was and is an internal Navy document which had not been given to LMT nor had it been published in the Federal Register prior to its use by Navy to effect the constructive termination of the contract at bar for the convenience of the government unilaterally without prior consultation with, or negotiation with, LMT, petitioner herein.

REASONS FOR GRANTING THE PETITION

Insofar as the alleged misuse of the LOF clause is concerned, this is apparently a case of first impression. Over the past two decades the Department of Defense (DoD) has expanded the range of applications of the LOF clause for purposes other than that for which the clause was originally intended. According to Navy Contract Law, 2nd ed., 443, (1959) w. 1965 Supp., the primary and original purpose of the Limitation of Funds clause was "to give the Government, unilaterally, an effective tool to prevent the over expenditure of appropriated funds," in accord with the Anti-Deficiency Act, 31 U.S.C. §665 (1958) and with the Adequacy of Appropriations Act, 41 U.S.C. §11 (1952). Thus the LOF clause originally was intended to assure that DoD did not obligate funds before their appropriation by Congress, and to provide against cost overruns with allotted funds, all in accord with Art. I, §9, cl. 7 of the Constitution.

Shortly after the original edition of Navy Contract Law was published, the board endorsed an expansion of the application of the LOF clause which apparently originally had been conceived by the Air Force. In ACME Precision Products, Inc., ASBCA No. 6824, 61-1 BCA 3051 at 15,785 (1961) we find:

> Notwithstanding the availability of additional funds which could be allotted to the contract, Government officials charged with responsibility for deciding whether additional funds should be allocated to the project may in their discretion decide that the expenditure of additional funds on the project is not warranted.

In a very real sense the issue before this Court resolves itself into the subsidiary question as to whether Navy, as part of DoD, may use this board construction of the LOF clause to justify its unilateral correction of its own unilateral mistake in authority made in issuing the contract at bar, and three others similarly funded. The problem presented Navy at the 15 September 1983 meeting was not whether the FY 84 funds were warranted, in the strict sense; Varley, the scientific

officer, testified at the board hearing that he had been pleased with the contract performance. Indeed, he had himself previously prepared the FY 84 funding request for the money needed to complete the contract. And Phase I was entire, not separable. Less than one-half of the contracted work had been completed when van Metre, the contracting officer, belatedly advised LMT that there would be no FY 84 funds, as had been anticipated by all parties privy to the contract. The real problem presented at the 15 September meeting was that the NTSA Charter prohibited their monitoring of the four contracts after transfer from ONR. It was not a question of the FY 84 funds being warranted; rather it was the discovery of ONR's unilateral mistake in authority in issuing the contract that prompted Navy to invoke the LOF clause and effectively or constructively terminate the contract for the convenience of the government without consultation or negotiation with LMT.

DoD has not been given carte blanche in its applications of the LOF clause. Thus in American Electronics Laboratories, Inc. v. United States, 774 F. 2d 1110 (Fed. Cir. 1985), though distinguished from the case at bar, the court below held that the government may not employ the LOF clause to excuse an otherwise justifiable estoppel.

The case at bar presents the question of whether the DoD may unilaterally correct its own unilateral mistakes in contracting, here a mistake in authority, by yet further extending the board's construction of permissible applications of the LOF clause. Literally billions of dollars of cost-reimbursement type research and development contracts have been and will be issued by DoD which are subject potentially to the central question here presented. By its silence on the question the court below effectively may be considered to have endorsed this further expansion of the application of the LOF clause. The principal reason for granting this petition, in accord

with Rule 17.1(c) of this Court, is that the writ of certiorari should be granted when a federal court of appeals has (here, effectively) decided an important question of federal law which has not been, but should be, settled by this Court.

Between private parties, ordinarily a unilateral mistake affords no ground for avoiding a contract, although it may do so where it results in a complete difference in subject matter so as to preclude existence of consideration, or where it is caused by, or known to, the other party. 17 C.J.S. §143, quoted in Garsick v. Dehner, 15 N.W.2d 235, 237 (Neb. 73). Navy's mistake in authority to contract did not alter the subject matter, nor did LMT either cause or know of Navy's unilateral mistake. Furthermore, parties must exercise ordinary diligence in the execution of contracts, and are chargeable with such knowledge as diligence would have disclosed, Vargas v. Esquire, Inc., 166 F.2d 651, cert. den. 69 S.Ct. 29 (1948), and generally may

not avoid a contract on the basis of mistake where it appears that ignorance of the facts was the result of carelessness, indifference, or inattention, 17 C.J.S. §135, Taylor v. Burr Printing Co., 26 F.2d 331, cert. den. 49 S.Ct. 641 (1928). Had ONR investigated or simply inquired of NTSA before execution of the contract at bar it would have learned that the NTSA Charter precluded monitoring the contract. Thus Navy did not exercise its simple duty of ordinary diligence, and was at least inattentive if not careless.

Navy is not a private party; but it was acting in its proprietary rather than sovereign capacity when it negotiated and executed the contract at bar. In United States v. A. Bentley & Sons Co., 293 F. 229, 235 (1923) the court noted:

> When the government enters into a contract with an individual or corporation, it divests itself of its sovereign character as to that particular transaction and takes that of an ordinary citizen and submits to the same law as governs individuals under like circumstances.

In accord is the court in McQuagge v. United States, 197 F. Supp. 460, 469 (1961):

> In ordinary contractual relations with its citizens, the government enjoys the same privileges and assumes the same liabilities as does its citizens. . . . When the government enters the market place, . . . , it submits to the same rules which govern legal relations among its subjects.

More recently, in Juda v. United States, 6 Cl. Ct. 441, 454 (1984), the court said:

> The sovereign act defense has no application when the challenged government actions do not have public and general applicability, or when the actions were focused principally and primarily with the injured claimant.

Navy's unilateral mistake in authority and associated alleged misuse of the LOF clause were focused entirely upon LMT and the other three contracts similarly funded. Navy had divested itself of its sovereign character and was subject to the same laws as govern private parties. Navy thus illegally avoided the contract at bar by its, consequently, misuse of the LOF clause.

And since ONR's mistake in authority was made before, but not discovered until after,

contract execution, the sovereign act doctrine was doubly inapplicable in that Navy's mistake occurred before the contract was awarded. Garcia Concrete, Inc., AGBCA 78-105-4, 82-2 BCA ¶ 16,046.

The conclusion is inescapable that Navy's use of the LOF clause unilaterally to correct its own unilateral mistake in authority was indeed a misuse and that Navy illegally avoided the contract.

Navy also has a duty always to treat its contractors fairly, United States v. Utah, N.&C. Stage Co., 199 U.S. 414 (1905), and it may not engage in conduct violative of express or implied contractual provisions and then assume the mantel of sovereignty to gain immunity from suit, Juda, supra, and Ottinger v. United States, 116 Ct. Cl. 282 (1950). In the case at bar, Navy did not consult or negotiate with LMT before unilaterally employing the LOF clause to correct its unilateral mistake once the mistake was discovered. And by invoking that clause, which is unique

to the government - being required of all DoD cost-reimbursement type research and development contracts, Navy in the manner it did effectively or constructively assumed the mantel of sovereignty. Thus once again Navy's actions are seen to have been illegal.

Navy's misuse of the LOF clause, being illegal, is thus seen to have been a clear error of judgement. And being a clear error of judgement, Navy correspondingly abused its discretion. A Government agency abuses its discretion if it fails to consider relevant factors or makes a clear error of judgment. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) and citations therein. Abuse of discretion does not imply bad faith, only bad judgement. And Navy displayed bad judgment in its misuse of the LOF clause to correct unilaterally its own unilateral mistake of authority.

Logically it is a second, clear abuse of abuse of discretion for Navy to implement a prior abuse of discretion by invoking its

power to terminate for convenience of the government. Yet that is effectvely what Navy did in employing the LOF clause to correct unilaterally its own unilateral mistake in authority. Constructively Navy terminated the contract for the convenience of the government, albeit after a delay occasioned by the period required by LMT to consume the remnant FY 83 funds after the belated notification by van Metre on 3 November 1983. But by law the government may not invoke its power to terminate for convenience when it would be a clear abuse of discretion to do so. National Factors Inc. v. United States, 204 Ct. Cl. 98 (1974) and Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982). Thus again it is seen that Navy misused the LOF clause in correcting its mistake in authority.

Indeed, as it was illegal, as shown heretofor, for Navy to avoid the contract by unilaterally correcting its own unilateral mistake, under the rule of National Factors, supra, it would have been illegal for Navy even to

have used overtly the termination for convenience of the government clause to correct its unilateral mistake. Under the law of unilateral mistake, Navy was required to permit LMT to continue performance of the contract.

Furthermore, by analogy to Schlesinger v. United States, 182 Ct. Cl. 571 (1968), Navy's action under the circumstances constituted a breach of contract. In Schlesinger, supra, a contract terminated by the government for default was found by the court actually to have been breached by the government as there had been no default. The analogy with the case at bar arises in that this contract was effectively or constructively terminated for the convenience of the government, through the misuse of the LOF clause as discussed heretofor, but as shown above Navy was precluded from such termination as a clear abuse of discretion. Where in Schlesinger there was termination for default and there was no default, in the case at bar there was, effectively or constructively, termination for the conven-

ience of the government when such termination was precluded by law. Navy's misuse of the LOF clause was thus a breach of contract, and LMT is entitled to the consequential damages it claims.

LMT contends this same conclusion may also be reached through an analysis employing the doctrine of finality: once an authorized agent has performed an act on behalf of the government, the government is bound. In performing their duties, government officers, employees or agents cannot be expected to act only in ways favorable to the United States. Whether resulting from mistakes, negligence or poor judgement, their statements, acts or omissions are sometime prejudicial to the Government. This may become evident from later reflection, subsequent events, or the influence of the agent's advisors, superiors or successors. As in the case at bar, in such cases attempts may be made to avoid the consequences by repudiating or countermanding the agents' acts. The government is also bound when the agent exercises

discretion entrusted to him by contract, law or regulation. See Federal Procurement Law, R. C. Nash and J. Cibinic, Jr., The George Washington University, Washington, D.C., Ch. 2, §2 (1977).

More generally, there are two major concepts which may be invoked to prevent the government from disowning its agent's acts or agreements: finality and estoppel. The court below limited itself to the question of estoppel, finding no credible evidence that Navy officials had promised LMT the anticipated FY 84 funds, and also finding no credible reliance to its detriment by LMT. Finality, not considered below, does not require reliance; nor does LMT rely here upon express and implied promises of funding. Rather LMT avers the doctrine of finality binds Navy from reversing two acts: the original negotiation and execution of the contract at bar, based as it was on Navy's mistaken belief the contract could and would be transferred from ONR to NTSA; and the mistaken ratification by the NTSA

Director, Letow, via his letter of 4 October 1983 (App. H, infra, 33a), of the verbal assurance given Sponsler by Varley and Francis, at the 7 September 1983 meeting, that the contract at bar would be transferred to NTSA.

As a prelude to this second, or finality, argument two facts need emphasis: Navy's mistake of authority occurred prior to, and contemporaneously with, the execution of the contract; and LMT did not known, nor could it have known, that the NTSA Charter precluded the transfer of the contract from ONR to NTSA. To LMT's knowledge, the internal NTSA Charter had not been published in the Federal Register. An internal instruction does not have the effect of a statute or regulation published in the Federal Register and is not binding on the contractor absent his knowledge of its existence. Electrospace Corp., ASBCA 14520, 72-1, BCA ¶9455 (1972) at 43,926. And as noted above, the Sovereign Act doctrine is not applicable if the act occurred before the contract was awarded, Garcia, supra.

In United States v. Purcell Envelope Co., 249 U.S. 313 (1919) this Court held that, when an authorized Government employee accepts an offer, a binding contract is created and that decision cannot ordinarily be reversed. In the case at bar, the "offer" was the original proposal, and its acceptence by the duly designated contracting officer, van Metre, constituted the acceptance. By invoking the LOF clause Navy unilaterally reversed the award, contrary to that holding, albeit after exhaustion of the FY 83 funds.

While it cannot be said the Government "authorizes" its agents to make mistakes, it is liable for the agent's action if it is within the scope of his authority. See Cooke v. United States, 91 U.S. (1 Otto) 389 (1875). Van Metre was the duly constituted contracting officer and it was his mistake, and that of his superior, the Acting Chief of Naval Research Capt. Garland (App. F, infra, 28a) that ONR 230 and NTSA were identical and

likewise that the contract could be transferred from ONR to NTSA. Similarly, Letow was the duly constituted NTSA Director, with full contracting authority therefor, and the United States is liable for his mistake in notifying LMT that the contract had indeed been transferred as Varley and Francis had advised Sponsler it would be. Here, in accord with Liberty Coat Co., ASBCA 4119, 4138 & 4139, 57-2 BCA ¶ 1576 (1957), in cases involving mistake the doctrine of finality may be stated as: the Government is bound by the acts of its authorized representatives, even if their decisions are erroneous.

In accord with the foregoing law, LMT contends that the doctrine of finality precluded Navy from using the LOF clause to correct unilaterally its own unilateral mistake in authority made in negotiating and executing the contract at bar. The contracting officer, van Metre, negotiated and executed the contract in the mistaken belief, in the words of his superior, the Acting Chief of Naval Research,

Capt. Garland, that ONR Code 230 and NTSA were "identical", whereas in fact the NTSA Charter precluded thet agency from monitoring the contract at bar and three others similarly funded. When the mistake in authority was discovered by ONR at the 15 September 1983 meeting chaired by NTSA Director Letow, ONR took recourse to the LOF clause unilaterally to correct their original mistake. By utilizing the LOF clause ONR preserved the appearance of recognizing the law, in accord with U.S. v. Purcell, supra, that once a binding contract is created that decision cannot ordinarily be reversed. But in fact ONR actually did reverse the decision to contract effective upon the exhaustion of the FY 83 funds. LMT contends that action was an evasion of the spirit of the law and is precluded by the doctrine of finality. The contract at bar for Phase I of the original proposal by LMT was an entire contract; it was not severable upon exhaustion of the FY 83 funds. Indeed ONR's action resulted in an aborted performance

by LMT which did not and could not fulfill the contract specifications for work on Phase I. Under the doctrine of finality, as per Liberty Coat Co., supra, Navy was bound by the acts of its contracting officer, van Metre, its authorized representative for both ONR and NTSA, in both negotiating and executing the contract at bar even though those decisions reflected the erroneous belief that the contract could and would be transferred from ONR to NTSA upon the disestablishment of ONR Code 230 on October 1, 1983. It thus was a misuse of the LOF clause, under the doctrine of finality, to employ it unilaterally to correct Navy's unilateral mistake in authority.

Navy was also barred by the doctrine of finality from unilaterally correcting the mistake of NTSA Director Letow who in error signed and mailed the letter of 4 October 1983 (App. H, infra, 33a) which, in the eyes of LMT, ratified the assurance given Sponsler by scientific officer Varley and his replacement, Francis, that the contract at bar was to be

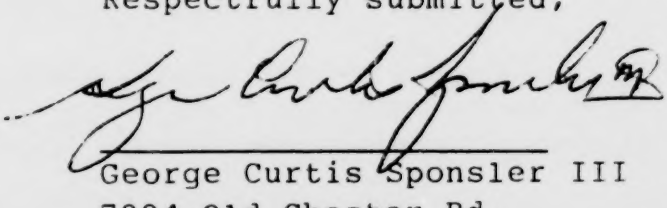
transferred to NTSA on October 1, 1983. This unilateral mistake by Letow was compounded by van Metre forgetting to advise LMT that the anticipated FY 84 funding had been withdrawn until he was phoned by Sponsler on 3 November, 1983 on another matter. Once again, in accord with Liberty Coat Co., supra, Navy is bound by the acts of its authorized representatives, here Letow, Varley and Francis, even though their decisions were erroneous. These same facts were embodied in LMT's prior claim of equitable estoppel, made to both the board and court below which restricted themselves, however, to promissory estopple. Here there can be no doubt that the doctrine of finality, if not that of equitable estoppel, precluded Navy from reversing itself and effectively or constructively terminating the contract at bar, by its alleged misuse of the LOF clause, for what was in fact the convenience of the government in order unilaterally to correct its own original unilateral mistake in authority in issuing the contract. In this, its second,

application the doctrine of finality precludes Navy from reversing the mistaken and erroneously reported decisions of its duly authorized and appointed scientific officers and NTSA Director, as reported officially to LMT, that the contract at bar was to be and had been transferred from ONR to NTSA.

CONCLUSION

Navy misused the Limitation of Funds clause in unilaterally correcting its unilateral mistake in authority. The doctrine of finality also precluded Navy from avoiding the contract after it had been negotiated and executed by its duly authorized contracting officer who acted in the mistaken belief that ONR and NTSA were "identical" and that the contract at bar could and would be transferred from ONR Code 230 to NTSA. The Court should grant this petition for a writ of certiorari.

Respectfully submitted,



George Curtis Sponsler III
7804 Old Chester Rd.
Bethesda, MD 20817
(301) 986-1120

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

LAW MATHEMATICS AND TECHNOLOGY, INC.

Appellant,

v.

THE UNITED STATES,

Appellee.

Appeal No. 85-2150

DECIDED: December 12,1985

Before RICH, SMITH and NEWMAN, Circuit Judges.

RICH, Circuit Judge.

This appeal is from the October 29, 1984, final decision of the Armed Services Board of Contract Appeals (board), No. 29714, 85-1 BCA (CCH) ¶17,765 (ASBCA 1984), denying appellant Law Mathematics and Technology, Inc. (LMT) additional funding for a contract involving research on air-launched and anti-ship missile defense for the Navy. We affirm.

Background

LMT is a research and development consulting firm. The president and principal corporate officer is George Curtis Sponsler, III, Ph.D., a lawyer recently admitted to the bar and a former employee of the Navy. Dr. Sponsler operates the consulting business from his personal residence in Bethesda, Maryland, and is also acting as LMT's counsel. He states in his reply brief that in the period here involved the contract at bar "was LMT's only source of revenue."

In 1982 LMT submitted an unsolicited research proposal to the Office of Naval Research (ONR) for a four-phase research project to identify anti-ship missile defense requirements. Phase I covered "defense of a single ship against air-launched missiles," and listed a total cost of $99,607 to be paid to LMT and a subcontractor.

The Navy handles such research proposals by assigning them to a "scientific officer," who reviews the proposal and then determines

whether to recommend or deny funding for the proposal. The scientific officer who reviewed LMT's proposal for the ONR, Dr. Thomas Varley , indicated to LMT that the Navy was interested in certain portions of the proposal. At Varley's suggestion, LMT submitted an amended proposal in December, 1982, which emphasized Phase I of the original proposal. In July, 1983, Varley again expressed interest in the proposal, but explained to Sponsler that the Navy lacked sufficient funds at that time to pay the entire $99,607. Varley then asked Sponsler how much it would cost the Navy to have LMT work on Phase I for the remainder of the 1983 fiscal year ("FY 83," until September 30, 1983). Sponsler replied that $50,000 would be adequate, and Varley prepared and submitted a procurement request for $50,000 toward completion of Phase I.

As a result of the scientific officer's request, the Navy approved the expenditure of $50,000 towards the performance of Phase I

of the LMT proposal and turned the matter over to one of its contracting officers, David van Metre, to negotiate a contract. During negotiations van Metre informed Sponsler that the Navy was not interested in Phases II-IV, and that because only $50,000 had been allotted to performance of Phase I , the proposed contract would include a "Limitation of Funds" clause. Van Metre also informed Sponsler that LMT could begin work at its own risk, and LMT commenced working on the project on July 18, 1983. The contract was formally executed on September 12, 1983.

The first page of the contract noted that $50,000 had been allotted by the Navy for LMT's work. The Limitation of Funds clause provided, inter alia, that "[t]he Contractor agrees to perform or have performed work on this contract up to the point at which the total amount paid and payable by the Government pursuant to the terms of the contract approximates but does not

exceed the total amount allotted to the contract." In addition, the contract included an "Explanation of Limitation of Funds" which provided:

> It is hereby understood and agreed that the Estimated Cost of the performance of this contract is $95,075.00, the Fixed Fee is $4,532.00, and the Total Estimated Cost & Fixed Fee is $99,607.00. The amount presently available for payment and allotted to this contract is an Estimated Cost of $47,710.00, a Fixed Fee of $2,290.00, and a Total Estimated Cost & Fixed Fee of $50,000.00. It is estimated that the amount allotted of $50,000.00 will cover the period 18 July 1983 through September 1983.

If additional allotments were not made to the contract, the rights of the parties were to be governed by subsection (d) of the Limitation of Funds Clause:

> (d) Except as required by other provisions of this contract specifically citing and stated to be an exception from this clause, the Government shall not be obligated to reimburse the contractor for costs incurred in excess of the total amount from time to time allotted to the contract, and the Contractor shall not be obligated to continue performance under the contract . . . or otherwise to incur costs in excess of the amount allotted to the contract . . . .

At the time of signing the contract, Sponsler

was aware that only $50,000 of appropriated 1983 funds had been allotted for performance of the contract, and no promises or assurances of any kind were expressly or impliedly made to LMT by any representative of the Navy that Congress would appropriate or that the Navy would allot fiscal year 1984 ("FY 84") funds to cover LMT's efforts beyond the $50,000 amount in the contract. Nevertheless, near the end of August, 1983, scientific officer Varley prepared an additional procurement request from FY 84 funds for $49,608, the final portion of the estimated cost of Phase I, to be added to the original contract by way of modification of the contract. After submitting the procurement request, Varley was transferred to another Navy office and no longer monitored LMT's contract.

The ONR office (word supplied) was "disestablished" by the Navy in early September, 1983, and the LMT contract was transferred to the Navy (word corrected) Tactical Support Activity (NTSA). On or about September 15,

1983, the Navy, acting through the NTSA, denied the procurement request for additional funds. At that time, van Metre attempted to inform Sponsler of the Navy's decision by telephone, but van Metre was unable to reach him because Sponsler was apparently on vacation.

On November 3, 1983, Sponsler called van Metre, in accord with the Limitation of Funds clause of the contract, to inform him that he expected to incur costs in excess of the original $50,000 allotment. Van Metre then informed Sponsler that no additional funds would be allotted and requested that LMT bring the contract to an orderly conclusion using the unspent funds to prepare a report on work accomplished up to that point. Sponsler then informed the subcontractor that work was being curtailed (word corrected) and prepared the report. LMT received a total of $50,000 for performing the contract.

After an unsuccessful effort to convince the Navy to invest additional funds to complete

Phase I as well as the previously proposed Phases II-IV, Sponsler filed a claim for additional funding with van Metre on March 15, 1984. Van Metre denied the claim in its entirety, and LMT appealed to the board.

The Board's Decision

The board found that both parties to the contract specifically agreed that the Navy had allotted only $50,000 out of FY 83 funds for LMT's services plus a fixed fee. The board also held that the language of the contract is clear and unambiguous and that there was no promise in the contract to allot more than $50,000.

The board also found that there was no credible evidence that the Navy promised or represented via words, actions, or inactions that funds beyond the $50,000 specified in the contract would be allotted, appropriated, or in any way made available. Moreover, said the board, even if it be assumed that the Navy's actions inferred (stet) a promise

or representation that additional funds would be allotted to the contract, the evidence disclosed no reasonable reliance to its detriment by LMT. Thus the board concluded, there was no legal basis to stop the contract from "dying a natural death."

OPINION

The Contracts Disputes Act of 1978, 41 USC 601-613, provides for judicial review of decisions of agency boards of contract appeals. See 41 USC 607(g) and 609. This court's scope of review of board decisions is governed by 41 USC 609(b), which provides that the board's decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fradulent, arbitrary, capricious, "so grossly erroneous as to necessarily imply bad faith," or "is not supported by substantial evidence." See Erickson Crane Company of Washington, Inc. v. General Electric Corp., 727 F.2d 1567, 1572 (Fed. Cir, 1984).

There is substantial evidence to support the board's conclusion that the language of the contract clearly and unambiguously limited the Navy's obligation to paying LMT no more than $50,000. The only legal issue for this court to decide is whether the Navy should be estopped from allowing the contract to expire and "[die] a natural death," according to its terms. (Emphasis added).

LMT argues that the Navy is barred by the doctrine of promissory estoppel from "withdrawing" the FY 84 funding. That argument is based on the assertion that the Navy representatives exhibited a course of conduct, in actions and inactions, that implied a promise that FY 84 funding would be provided to permit the contemplated conclusion of Phase I.

The doctrine of promissory estoppel was originally set down as Section 90 of the Restatement of Contracts. The text of Section 90, as it appears in the Second Restatement

provides:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

A party claiming an estoppel of this nature must prove, first, that there was a promise or representation made, second, that the promise or representation was relied upon by the party asserting the estoppel in such a manner as to change his position for the worse, and, third, that the promisee's reliance was reasonable and should have been reasonably expected by the promisor. See Heckler v. Community Health Services of Crawford, __ U.S. __, __, 104 S. Ct. 2218, 2223 (1984).

In rejecting LMT's estoppel argument, the board determined that there was no credible evidence that the Navy made any promise or representation that funds beyond the $50,000 specified by the contract would be allotted and that LMT did not reasonably

rely to its detriment on such a promise or representation. We agree. There was no such promise to allot more than $50,000 for LMT's performance. LMT's allegations regarding the "implication" of a promise, which are based primarily on Sponsler's own assumption that Phase I of LMT's research proposal would be funded in its entirety, are not sufficient to prove the existence of such a promise or representation.

The board also determined that LMT failed to prove detrimental reliance on any promise or representation, assuming arguendo that one was made. To prove reliance, LMT must demonstrate that its actions or forbearance amounted to a substantial change of position. The abandonment of a peppercorn or the turning over of the hand is not enough, Corbin on Contracts, §200. Here, LMT provided only those services which were funded under the original $50,000 allotment and acted to keep its performance within such limits. Sponsler, after he was informed that no

money beyond the original $50,000 would be forthcoming, did as he was asked by van Metre and used the remaining FY 83 funds to prepare a report on the work accomplished up to that point, rather than proceeding to complete Phase I in its entirety.

Sponsler claimed that LMT's damages were "what I would have earned had I been able to work" on the contract and that LMT concentrated solely on the Navy contract, thereby causing it to forebear from entering the market for other contracts. However, LMT failed to introduce any evidence of anticipated profits on the Navy contract or any evidence that it had plans to enter the market for other contracts. Such a speculative claim of damage does not amount to a "substantial change of position" so as to prove detrimental reliance within the meaning of the doctrine of promissory estoppel.

Finally, even if LMT had relied to its detriment on any promises or assertions by the Navy, such reliance could not have

been reasonable in this case. Dr. Sponsler is an attorney, with the ability to understand the specific limitations of the contract language. Moreover, Sponsler is also a former Navy employee, and should have been, if he was not, familiar with the uncertainty of relying on additional allocations to Navy research contracts.

This situation is distinguishable from that in American Electronics Laboratories, Inc. v. United States, 774 F. 2d 1110 (Fed. Cir. 1985), in which this court recently held that the government was estopped from invoking a similar Limitation of Funds clause. In American Electronics, the contractor had experienced cost overruns in excess of $1,000,000 in continuing performance on a contract for the production of electronic test equipment for the Army. While the Limitation of Funds clause asserted by the government was identical to the clause in this case, the court held that the contractor continued

performance by reasonably relying on the conduct of the government, whose representatives clearly implied that additional funds would be forthcoming.

None of these estoppel elements are present here. LMT has not proved that the government's conduct caused it to reasonably rely on additional allotments to the contract or even that LMT continued to perform the contract after notifying the government that it anticipated needing extra funding. LMT has thus failed to prove any of the elements necessary to prevail in its claim, under the doctrine of promissory estoppel or otherwise.

Conclusion

For the foregoing reasons, the decision of the board is in all respects affirmed.

AFFIRMED

Appendix B

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --

Law Mathematics and Technology, Inc.

Under Contract No. N00014-83-C-0492

ASBCA No. 29714

OPINION BY ADMINISTRATIVE JUDGE HARPER
PURSUANT TO RULE 12.3

(Summary findings of fact omitted as duplicative of that of Court of Appeals and for brevity).

DECISION

In this appeal we must decide whether Navy is estopped from allowing the contract to expire and, if not, whether LMT is entitled to damages arising out of a Navy abuse of discretion tantamount to a breach of contract.

To gain the benefit of an estoppel LMT had the burden of proving by a preponderance of the evidence that Navy made a promise or representation of fact that led LMT to reasonably rely upon it to LMT's detriment.

See, Heckler v. Community Health Services, ___ U.S. ___, 81 L.Ed 2d 42, 104 S.Ct. 2218 (1984); Hughes Aircraft Corporation, ASBCA No. 24601, 83-1 BCA ¶ 16,396; Restatement (Second) of Contracts § 90.

The evidence shows that the parties specifically agreed in their written contract that Navy allotted only $50,000 out of fiscal year 1983 funds for payment of the services to be rendered and fixed fee. Navy promised to pay up to $50,000 and, in fact, did pay to LMT all of such $50,000. In return for Navy's promise LMT promised to perform research costing up to $47,710. The parties specifically agreed that LMT did not have to perform work costing in excess of $47,710. Likewise they agreed that Navy did not have to pay more than $50,000 to LMT. The language of the contract is clear and unambiguous. There was no promise in the contract to allot more than $50,000 for LMT's performance.

There is no credible evidence that Navy,

acting through any of its agents, employees or representatives, at any time promised or represented via words, actions or inactions that funds above and beyond the $50,000 specified in the contract would be allotted, appropriated or in any other way made available to LMT, Sponsler or Data Measurements Corporation (the subcontractor, name identified for convenience) for research or any other purpose or activity directly or indirectly connected with performance of the contract.

Moreover, even if, for the sake of argument, it was assumed that Navy's actions inferred (stet) a promise or representation that additional funds would be allotted to the contract an essential element of estoppel is missing in this instance. The evidence discloses no reasonable reliance to its detriment by LMT upon any such implied or inferred promise or representation. LMT provided only enough services to consume the $50,000 allotted to the contract. It

did not furnish services relying upon a belief that the additional funds would be allotted. LMT accepted the limits of the funding and acted to keep its performance within such limits. Such is not action to its detriment based upon reliance on a belief that more than $50,000 would be available. Quite to the contrary LMT relied upon the express terms of the contract and the assurances of the contracting officer that only $50,000 was available.

We conclude that under the facts of this appeal there is no legal basis for estopping Navy from permitting the contract to die a natural death. We further conclude that there is no merit in LMT's argument that Navy is estopped from allotting some of the money from the 1984 fiscal year funds to extend performance of certain existing contracts while refusing to allot any of such funds to LMT's contract. LMT points to no authority, (nor are we aware of any), that requires Navy to apply monies so as

to extend the LMT contract. There is no duty under the law or otherwise upon Navy to purchase LMT's services if the Navy in its own discretion decides that it is not in the best interests of the Government to do so.

(Finally, we turn) to the question of whether LMT is entitled to damages arising out of the claimed abuse of discretion. From evidence before us we find no abuse of discretion thus we conclude that there is no entitlement to the damages claimed. In the absence of a desire by Navy to receive more of what LMT offered the contracting officer acted reasonably in permitting the contract to run its course within the monetary limits agreed upon by the parties. At the time LMT advised Navy that 76% of the funds allotted for performance of the contract were about to be consumed the contracting officer knew that Navy did not wish to receive all of the research contemplated for Phase I. Rather than terminate the contract

immediately with the result that Navy would have nothing to show for its expenditure of public funds the contracting officer reasoned that the balance of the funds allotted, but then unspent, should be consumed in the preparation of a final report that would memorialize the effort that had been purchased up to that time. Thus the contracting officer directed LMT to utilize the balance of the funds in the preparation of a final report. This direction by the contracting officer was well reasoned under the circumstances, was not arbitrary or capricious, was within the discretion normally prescribed for such officers, and was not a clear error of judgement such as to render it subject to reversal.

The appeal is denied.

Dated 29 October 1984

HERBERT C. HARPER
Administrative Judge

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

LAW MATHEMATICS & TECHNOLOGY, INC.

Appellant

v.

THE UNITED STATES

Appellee

No. 85-2150

JUDGEMENT

ON APPEAL from the ARMED FORCES BOARD OF CONTRACT APPEALS

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED.

ENTERED BY ORDER OF THE COURT

Francis X. Gindhart, Clerk

DATED December 12, 1985

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

LAW MATHEMATICS & TECHNOLOGY, INC.

Appellant

v.

THE UNITED STATES

Appellee

No. 85-2150

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is, Denied.

FOR THE COURT:

Francis X. Gindhart, Clerk

Date: February 18, 1986

cc: George C. Sponsler

John S. Groat

Appendix E

Department of the Navy
Office of Naval Research
Arlington,Virginia 22217
612B:DVM:me
21 May 1984

Law Mathematics and Technology, Inc.
Attn: Dr. G.C. Sponsler
7804 Old Chester Road
Bethesda, Maryland 20817

Gentlemen:

I have reviewed your 15 March 1984 letter by which you submitted a claim in accordance with the Disputes Clause of your Contract N00014-83-C-0492. Your claim states that you conclude that the Navy Tactical Support Activity's (NTSA) decision not to provide the Fiscal Year 1984 increment of funds "constituted an abuse of discretion tantamount to breach of contract."

Your contract was initiated by the Office of Naval Research Code 230 using Monitor and Assess Fleet Tactical Development and Evaluation Program (MAFTEP) funds. A small amount of these funds had been set aside for efforts involving the determination

of technological implications resulting from Navy's Tactical Development and Evaluation (TAC D&E) Program. On 30 September 1983, Code 230 was disestablished, and the TAC D&E Program and all other contract efforts were transferred to NTSA. Since NTSA's Charter does not provide for them to pursue "technological implications" but to adhere strictly to tactical development and evaluation, that portion of the MAFTEP funding was reprogrammed, and all related contracts were allowed to expire.(Emphasis added).

The Limitation of Funds (LOF) Clause (DAR 7-402.2(c)) included in the General Provisions of your contract merely states (in Paragraph (b)), "It is contemplated that from time to time additional funds will be allotted to this contract up to the full estimated cost ... " There is nothing, however, in the LOF clause, or elsewhere in the contract, that makes it mandatory for the government to provide additional increments of funds. In fact, Paragraph (c)

of the LOF clause states, "If, after such notification, additional funds are not allotted ... ," which indicates that there is the possibility that additional funding may not be forthcoming.

Paragraph (c) of the LOF clause also requires the Contractor to provide written notification to the Contracting Officer when he has reason to believe that within the succeeding sixty (60) days he will exceed expenditure of seventy-five percent (75%) of the funds allocated to the contract and shall indicate the estimated amount of funds required to continue performance of the contract. This notification was never made for your contract. (Note added: such notification was given telephonically, see Appendix A at 7a supra).

Furthermore, Paragraph (d) of the LOF clause states, "... the Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the total amount from time to time allotted to the

contract, and the Contractor shall not be obligated to continue performance under the contract ... or otherwise to incur costs in excess of the amount allotted to the contract, unless and until the Contracting Officer has notified the Contractor in writing that such allotted amount has been increased ...". Such notification was not made for your contract.

Base on the above analysis, your claim is denied.

This is the final decision of the Contracting Officer. This decision may be appealed to the Board of Contract Appeals. If you decide to make such an appeal, you must . . . ." (Directions for making appeal omitted).

Sincerely,

DAVID R. VAN METRE

CONTRACTING OFFICER

Appendix F

Department of the Navy
Office of Naval Research
Arlington, Virginia 22217
191:RAN:me
29 July 1983

Memorandum for Director Tactical Readiness Program (OP-953)

Subj: Transfer of TAC D&E Support Function

References : (Omitted)

This confirms earlier staff level discussions with your staff and your predecessor, RADM Cassidy, concerning transfer of the TAC D&E support function currently being performed by ONR . . . .

As you probably know, the rationale for ONR involvement in the TAC D&E Program has been the subject of my concern for at least the past few years. (Emphasis added). A little more than two years ago the matter was very carefully reviewed. At that time, a rationale for continued involvement was clarified and spelled out in some detail. The primary justification centered on the apparent opportunity to gain operational insight into fleet needs that would be trans-

lated into implications for ONR/ONT research and technological efforts.

During the past two years, it has become very clear that this apparent opportunity can be achieved only to a limited degree. The number and significance of the research and technological implications that have been identified do not justify the effort, neither in terms of numbers of people devoted to this task, nor in terms of dollars spent. The fact that another organization (Navy Tactical Support Activity) already exists and is chartered to provide identical TAC D&E support removes the questionable justification for our continued participation. Continued ONR participation in TAC D&E support is not justifiable on mission, requirement or other basis. There appear to be significant advantages to be gained for the TAC D&E Program by consolidationg support functions at NTSA in order to reduce overlap and the potential for unnecessary duplication. (Emphasis added).

We have proposed a phased transfer of the TAC D&E support function in order to avoid any adverse impact on the provision of services to operational commands. The ONR Code 230 function is planned to be transferred on 1 Oct 1983. The actual contract negotiation and administrative functions performed by ONR Code 600 are planned to be transferred no later than 1 Oct 1984.

. . . (Final paragraph omitted).

KEITH P. GARLAND

Captain, USN

Acting Chief of Naval Research

Appendix G

232:JBR:cf
Ser 242
16 Sep 83

MEMORANDUM

From: Code 232
To: Code 612B (Van Metre, name supplied)
Via: Codes 230, 200, & 511B

Subj: Disposition of currently funded TAC D&E Support Contracts (Emphasis supplied).

Ref: (a, b, &c omitted).

(d) PR 364-632 dated 18 July 83

1. A review of procurement requests recently submitted for TAC D&E Support Program has been completed by the Director of the Naval Tactical Support Activity. As a result of this review, it is requested that the following actions be completed on references (a) through (d). As each reference pertains to ongoing contracts, the work should continue and draw to a conclusion within currently funded limits. No additional funds will be provided from PE 65155 in FY84. Funds cited in the references should be restored to the operating accounts for future use.

. . .

d) Reference (d), an incremental funding request in the amount of $49,608 for Law Mathematics and Technology, Inc. should be cancelled and returned.

J. B. Rimmington

cc: A. Letow (Director NTSA, identification supplied)
Dr. Varley

Appendix H

DEPARTMENT OF THE NAVY

NAVY TACTICAL SUPPORT ACTIVITY

P.O. Box 1042

Silver Spring, Maryland 20910

NTSA:MDM:092:mdm
4 October 1983

Law Mathematics & Technology, Inc.
7804 Old Chester Road
Bethesda, MD 20817

Dear Sir:

Effective 1 October 1983, the Navy Tactical Support Activity will assume all responsibility for the TAC D&E Management Support Program. Contracts that are in effect and procurement actions presently in the solicitation stage will be monitored by this activity. In order to assure timely response to all technical and contractual matters, it is requested that all correspondence be forwarded to:

Navy Tactical Support Activity
P.O. Box 1042
Silver Spring, Maryland 20910

Sincerely yours,

ALAN M. LETOW
Director

Appendix I

Excerpts from Contract Schedule

***

SECTION B - SUPPLIES/SERVICES AND ESTIMATED COSTS

ITEM NO.	SUPPLIES/SERVICES
0001	The Contractor shall furnish the necessary personnel and facilities to conduct research as described in Section C.

ESTIMATED COST	FIXED FEE	TOTAL ESTIMATED COST & FIXED FEE
$95,075.00	$4,532.00	$99,607.00

***

SECTION C

***

2. The Contractor shall develop and test methods for the identification and evaluation of technological opportunities based on the analysis of tactical and related documentation available through the TAC D&E support program.

. . .

***

SECTION F - DELIVERIES OR PERFORMANCE

The research work under this contract shall be conducted during the period 18 July 1983 through 18 February 1984. . . .

***

1. Method of Payment

***

(a) Costs . . . not to exceed the amount set forth as "Estimated Cost" in Section B, subject to the General Provisions entitled "Limitation of Funds".

***

3. Explanation of Limitation of Funds

(See Appendix A, supra, 5a.)

***